TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Fifth Circuit, *Texas Cable & Telecomms. Ass'n v. Hudson, et al.*, No. 06-51514 (Feb. 7, 2008) 1a

Order of the United States District Court for the Western District of Texas, *Texas Cable & Telecomms. Ass'n v. Hudson, et al.*, No. A 05 CA 721 LY (Sept. 28, 2006) 18a

Order of the United States Court of Appeals for the Fifth Circuit Denying Rehearing, *Texas Cable & Telecomms. Ass'n v. Hudson, et al.*, No. 06-51514 (Mar. 14, 2008) 27a

Order of the United States Court of Appeals for the Fifth Circuit Denying Rehearing En Banc, *Texas Cable & Telecomms. Ass'n v. Hudson, et al.*, No. 06-51514 (Mar. 14, 2008) 29a

Constitutional and Statutory Provisions Involved:

U.S. Const.:

Art. VI, cl. 2 (Supremacy Clause) 31a

Amend. I (Free Speech Clause) 31a

Amend. XIV, § 1:

Due Process Clause 31a

Equal Protection Clause 31a

Communications Act of 1934, § 621, 47 U.S.C. § 541 ..... 32a

Texas Util. Code Ann. §§ 66.001-66.016 ..... 37a

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-51514

TEXAS CABLE & TELECOMMUNICATIONS ASSOCIATION,
Plaintiff-Appellant,

v.

PAUL HUDSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION OF TEXAS; JULIE PARSLEY, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS; BARRY SMITHERMAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS,
Defendants-Appellees,

AND

TEXAS COALITION OF CITIES FOR UTILITY ISSUES; GTE SOUTHWEST INC. D/B/A VERIZON SOUTHWEST; SOUTHWESTERN BELL TELEPHONE, L.P. D/B/A SBC TEXAS; GRANDE COMMUNICATIONS NETWORKS, INC.,
Intervenor Defendants-Appellees.

Feb. 7, 2008

Appeal from the United States District Court for the Western District of Texas, USDC No. 1:05-CV-721.

Before JOLLY, DAVIS, and WIENER, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

The Texas Cable & Telecommunications Association ("TCTA"), on behalf of its member cable providers, filed suit challenging a statute recently enacted by the Texas legislature that was intended to reform the cable service industry in the state. The TCTA claimed the statute was unconstitutional primarily because it unjustifiably discriminated against its members, who are incumbent cable providers, in favor of those providers who would now be permitted to enter the market under the new statutory scheme. Furthermore, the TCTA also alleged that the Texas statute violated the Supremacy Clause. The district court dismissed the complaint under Rule 12(b)(6), Fed.R.Civ.P., holding that the TCTA lacked standing because no discernable injury had occurred and that the case was not yet ripe for litigation. The TCTA appeals that dismissal. We hold that the TCTA's complaint adequately alleges Article III standing to survive a Rule 12(b)(6) motion. The district court therefore erred in dismissing the complaint, requiring that we therefore REVERSE and REMAND for such further proceedings as are appropriate.

I.

This case arises from an effort by the Texas legislature to overhaul the regulation of the cable industry and video programming in the state. Understanding

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

this effort requires some description of the system that the legislature sought to replace.

A variety of different groups compete to bring video programming to Texas communities. Many communities have a single "incumbent" cable operator, often the operator that first introduced cable services to that community. These cable operators now face direct competition from overbuilders – companies that build cable systems in areas that are already served by another cable operator – and from telephone companies attempting to expand into new markets.

All of these cable providers – incumbents, overbuilders, and telephone companies – must use public rights of way to install their equipment. In order to use these public facilities, the original cable providers in a community had to seek the permission of municipalities before constructing their cable systems. This permission took the form of "franchise agreements," long-term contracts with municipalities in which cable operators were allowed to build their systems in exchange for extensive municipal regulation, including the payment of fees.

The terms of the franchise agreements came under federal regulation in 1984, when Congress added Title VI to the Federal Communications Act. Title VI allows these franchise agreements, but requires that the franchise agreements meet certain federal standards. A franchising authority must assure, for example, that franchisees do not deny cable services to potential subscribers based on the low income of the region in which the potential subscribers reside. Later amendments addressed competition. Franchising authorities are now prohibited from granting exclusive franchises to cable operators, many of

which had monopolies in their respective local markets. Congress also repealed a ban that prevented telephone service providers from entering the video services market. Although these measures encouraged competition in the cable industry, many cable operators in Texas still operated as monopolies in their respective franchise areas.

The growth of competition, that is, allowing new entrants into the municipal markets, was hindered because franchise agreements remained at the local, rather than state, level. A new entrant to the cable service market, such as a telephone company, would therefore have to negotiate separate contracts with each target municipality. The costs of negotiating these individual license agreements, and the potential for variance among them, led to the passage of the "Act Relating to Furthering Competition in the Communications Industry" ("the Act"), an amendment to the Texas Utility Code.

The Act creates a state (as opposed to a local) franchising process. A new entrant must first petition the Texas Public Utility Commission ("the PUC") for permission to operate in the communities it seeks to enter. If the new entrant is able to satisfy some very basic requirements, the PUC is obliged to grant the requested certificate of franchise authority for the market or markets applied for. Incumbent providers, however, are explicitly excluded from this process for the communities in which they operate and remain bound to their previous franchise agreements. On the other hand, overbuilders operating in the same market as the incumbent are allowed to terminate their municipal agreements in favor of the new state certification process. This disparate treatment of incumbents, as opposed to new entrants and over-

builders, led to the lawsuit at issue here. The TCTA, representing its members, filed suit the day after the passage of the Act, seeking to have the Act declared unlawfully discriminatory and to enjoin its enforcement.

II.

The TCTA claimed that the Act violated the United States Constitution in several respects. According to the TCTA, the Act's discrimination against its members by favoring new entrants and overbuilders is without reasonable justification, and consequently violates the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The TCTA further claimed that the Act is incompatible with various sections of the Federal Communications Act, and thus is in violation of the Supremacy Clause. Several interested parties intervened on behalf of the state defendants and filed motions to dismiss. The district court, largely on the strength of an in-court statement by the TCTA that "it's too soon to tell" what impact the Act will have on the profit of its members and competition among cable providers, found that each of the claims made by the TCTA were non-justiciable for lack of standing and ripeness. More specifically, the district court concluded that the TCTA failed to allege a concrete, cognizable injury suffered, or likely to be suffered, by any of its members and, moreover, had admitted that the time was not ripe for making such a determination. The district court therefore granted a rule 12(b)(6) motion to dismiss for failure to state a claim with respect to all defendants and intervenor-defendants. This appeal followed.

III.

The TCTA argues that it has alleged straightforward injuries that make its claims justiciable. The new regulatory structure created by the Act discriminatorily removes certain regulatory restrictions on potential competitors while leaving those restrictions in place with respect to incumbent cable providers; this competitive disadvantage to incumbent providers, it is argued, results in a justiciable economic injury, irrespective of whether the TCTA's members have actually yet faced the increased competition. Further, the TCTA argues that the statute's unreasonable categorization and consequent differing treatment of various service providers – new entrants and overbuilders against incumbents – alone constitutes a cognizable constitutional injury. And, concerning both injury and ripeness, the TCTA urges that it never made a general admission before the district court that its members had not yet suffered an injury. Instead, the TCTA contends that it only acknowledged that it is too soon to tell whether the injury will mean its member providers will have to operate at an actual deficit. Finally, with respect to ripeness, the TCTA points out that its various complaints about the Act are purely legal – no further factual development is necessary in order for the case to proceed.

A number of arguments supporting the district court's ruling, as well as alternative arguments, are advanced by various of the defendants. At the bottom of all of these, however, is the same complaint: lack of detail in the TCTA's allegations. The TCTA did not specify which of its members would be injured; nor did it allege the precise harms that its members would suffer under the Act. This lack of

specificity was construed by the district court – and is now argued by the defendants – to mean that the TCTA lacked standing because no one member of the TCTA is alleged to face an actual economic harm; the TCTA therefore could show no "concrete" injury. Moreover, this uncertainty about the precise effect that the Act would have on the TCTA's members led the district court to conclude that the TCTA had filed suit prematurely. Thus, the possibility that the Act had no effect on some of the TCTA's membership, and that it may not have economically disadvantaged all of those that it did affect, was sufficient reason to find justiciability lacking.

Several prospective competitors to the TCTA's members join in this argument, but along slightly different lines. Expanding on a brief statement made by the district court, they urge that the TCTA has challenged the Act on its face; as such, the TCTA must show not only that the Act is unconstitutional in all of its applications, but that it also has caused concrete injury in all of its applications. The argument continues, asserting that, because of the nature of the TCTA's claims, its failure to state the specific ways in which all or any of its members have been injured is fatal to a claim of standing.

Precisely the same considerations animate the challenge to the TCTA's assertion of associational standing. The Texas Coalition of Cities for Utility Issues ("TCCUI") argues that the TCTA lacks associational standing because the Act will have diverse effects on the TCTA's membership – some members will not be put at a disadvantage and those that are will be disadvantaged in widely varying degrees. As a result, the TCCUI claims that the participation of the TCTA's individual members is necessary to

resolve this case, and the TCTA thereby lacks standing to bring suit on behalf of a group with such diverse interests and alleged, but undetermined, injuries.

IV.

A.

The district court dismissed the TCTA's complaint for lack of standing under Rule 12(b)(6). Thus, as we have made clear, the precise and only issue before us is whether, for purposes of surviving a Rule 12(b)(6) motion, the plaintiffs have alleged grounds for standing. Dismissals under Rule 12(b)(6) are reviewed *de novo*. *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 246 (5th Cir.1997).

> A motion to dismiss under rule 12(b)(6) is viewed with disfavor and is rarely granted. The complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be taken as true. The district court may not dismiss a complaint under rule 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. . . . The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief.

Id. at 247 (internal citations and quotation marks omitted). We begin with the proposition that the Constitution of the United States limits the jurisdiction of federal courts to "Cases" and "Controversies." *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). A central element of this jurisdictional limitation is the doctrine of standing, which

"set[s] apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Standing ensures that a plaintiff has "'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). Accordingly, an association may appear as a plaintiff so long as it is asserting either its own interests as an association or by appearing "solely as the representative of its members." *Id.* at 511.

In order to have such representational standing, an association must satisfy three requirements: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). Thus, because standing must exist independently among the association's membership, "representational standing . . . does not eliminate or attenuate the constitutional requirement of a case or controversy." *See Warth*, 422 U.S. at 511. The association must still show that "its members, or any one of them" have standing. *Id.*

The Supreme Court has "established that the irreducible constitutional minimum of standing contains three elements": injury-in-fact, causation, and redressability. *Lujan*, 504 U.S. at 560. Only injury-

in-fact is in dispute here. Though the terms used in defining an injury-in-fact are "concededly not susceptible of precise definition," *Allen*, 468 U.S. at 751, the plaintiff is required to show "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal citations and quotation marks omitted). What's more, "a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 126 S.Ct. 1854, 1867, 164 L.Ed.2d 589 (2006).

B.

Before reaching the substantive issues related to standing, the procedural posture of this case – dismissal on the pleadings – requires some comment, for it informs the adequacy of the TCTA's claims for standing. The burden of establishing the elements of standing is on the party seeking jurisdiction in the federal courts. *Lujan*, 504 U.S. at 561. And "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* Evidently then, the requirements of the plaintiff with respect to a motion to dismiss and an adversarial motion for summary judgment will be substantially different. Indeed, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)) (alteration in original). In

contrast, general allegations will not suffice for summary judgment; specific facts must be adduced instead. *See id.*

As in this case, the stage of litigation determined the standing analysis in *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). In *Bennett*, a number of plaintiffs objected to a biological opinion issued by the Fish and Wildlife Service. *Id.* at 157. That biological opinion, which was mandated by the Endangered Species Act of 1973, suggested that certain reservoirs maintain minimum water levels for the purpose of protecting indigenous species of life. *Id.* at 157-58. The plaintiffs complained that such minimum levels would diminish their use of the reservoirs for irrigation and other purposes, causing them injury. *Id.* at 160.

The government contended that the plaintiffs had no standing to bring such a suit. *Id.* at 161. Specifically, the government argued that the plaintiffs' allegations failed to satisfy the injury-in-fact element of standing "because they demonstrate only a diminution in the *aggregate* amount of available water, and do not necessarily establish . . . that *petitioners* will receive less water." *Id.* at 167. But the court, relying on *Lujan*, rejected this argument: "Given petitioners' allegation that the amount of available water will be reduced and that they will be adversely affected thereby, it is easy to presume specific facts under which petitioners will be injured." *Id.* at 168. Because the facts necessary for the aggregate diminution of available water to harm the petitioners reasonably could be inferred, the court found the injury-in-fact standing requirement satisfied. *See id.*

This appeal presents an analogous situation. The TCTA has made general allegations of direct harm,

arguing that the Act singles out incumbent cable providers for treatment different from other parties. Perhaps most significantly, the TCTA contends that all of its members are prepared to seek state-level franchises if they are permitted to do so, indicating that the TCTA members consider the Act to be to their universal benefit (if they can be included). As in *Bennett*, then, the TCTA's complaint has not identified a specific member who will be injured by the government action. But these allegations, referring to the general membership, state that the TCTA's membership is adversely affected by the Act through its discriminatory denial of a desirable benefit. The central inquiry before us, then, is whether the injuries that the TCTA generally alleges support the kind of reasonable inference made in *Bennett* by which a constitutionally sufficient injury-in-fact may be presumed.[1]

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[1] The cases cited by the state defendants do not show that such a presumption may not be made on the facts before us. Instead they demonstrate that there must be some rational basis for that presumption. In both *Public Citizen, Inc. v. Bomer*, 274 F.3d 212 (5th Cir.2001) and *Ward v. Santa Fe Independent School District*, 393 F.3d 599 (5th Cir.2004), the plaintiffs had failed to show a connection between the alleged unconstitutional actions and an injury to the plaintiffs themselves. *See Bomer*, 274 F.3d at 218 (noting that the plaintiffs "point[ed] to no past case in which a judgment was tainted by contributions; they mention[ed] no current litigation in which an opposing party or lawyer contributed to the judge's campaign; and they merely speculate[d] as to the future"); *Ward*, 393 F.3d at 606 (noting that "[t]he only legal right or interest of the [plaintiffs] even vaguely asserted in the complaint is their right, as taxpayers, to make certain that public entities do not use tax revenue to support unconstitutional acts").

C.

The TCTA argues that its standing to challenge the Act is adequately supported by two types of injury. economic injury and constitutional injury. First, the TCTA alleges that the Act has the effect of depriving its members of revenue and profit and, second, that the Act inflicts a constitutional injury by unjustifiably treating incumbent cable providers differently from new entrants to the video services market. These injuries, in the light of *Bennett*, are more than sufficient to establish the TCTA's standing and require only brief comment.

Deprivation of revenue and profit is premised by the TCTA on lost business opportunities resulting from the Act's allowing new players into the TCTA members' respective municipal markets on more favorable terms. More specifically, the Act allows competitors to the incumbent cable providers to enter municipal markets with no requirement for municipal licensing and pass these savings on to consumers, while incumbents remain burdened with licensing costs. The TCTA therefore identifies its members' threatened loss of revenue with this increased competition that the Act allows. And the regulatory allowance of increased competition in a plaintiff's market has been established in our circuit as a clear injury-in-fact, *see Environmental Defense Fund v. Marsh*, 651 F.2d 983 (5th Cir.1981); *Hollingsworth v. Harris*, 608 F.2d 1026, 1028 (5th Cir.1979) (per curiam), even when such competition is inchoate, as it is here.[2] As a result, the presumption of *Bennett* is

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[2] *Marsh*, where the increased competition was government sponsored, illustrates this point well. There, a railroad and other plaintiffs objected to a governmental decision that made the construction of a canal more likely. *See id.* at 1003.

well-supported: the Act was passed to increase competition and a reasonable inference may therefore be made that the TCTA's members are harmed at least to the same extent as the plaintiffs in *Marsh* and *Hollingsworth*.

D.

In addition to competitive or economic injury, a constitutional injury also provides standing. The TCTA contends that the Act unlawfully discriminates against its membership by unjustifiably favoring non-incumbents over incumbents. Discriminatory treatment at the hands of the government is an injury "long recognized as judicially cognizable." *Heckler v. Mathews*, 465 U.S. 728, 738, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984). And such injury is recognizable for standing irrespective of whether the plaintiff will sustain an actual or more palpable injury as a result of the unequal treatment under law or regulation. *See Ne. Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993).[3] Here, the Act facially discriminates against

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Because the canal would compete with the railroad in the shipping market – and despite the fact that the canal's construction, much less its competition with the railroad was anything but imminent – the court found there to be sufficient injury for standing. *See id.* at 1004. *See also Hollingsworth*, 608 F.2d at 1028 (finding "[e]conomic 'injury' in the form of increased competition" adequate for standing where nursing home owner challenged administrative decision that would have allowed entry of competitor into market but where competition had not yet taken place); *New England Public Commc'ns Council, Inc. v. FCC*, 334 F.3d 69, 74 (D.C.Cir.2003); *Adams v. Watson*, 10 F.3d 915, 921 (1st Cir.1993) (collecting cases).

[3] Furthermore, the Supreme Court has recognized that such discrimination need not be predicated on suspect classifications

the TCTA's membership by extending the benefit of a state-wide license to its competitors while denying that same benefit to incumbent cable providers. As *Northeastern* held, such discrimination can constitute an injury because it positions similar parties unequally before the law; no further showing of suffering based on that unequal positioning is required for purposes of standing. Accordingly, the TCTA has alleged a constitutional injury that survives a Rule 12(b)(6) motion.[4]

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to constitute cognizable injury. In *Clinton v. City of New York*, 524 U.S. 417, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998), several groups challenged the constitutionality of the Line Item Veto Act. One of these groups, a farmer's cooperative, claimed that it was injured when the President canceled a tax benefit that would have aided it in obtaining certain processing facilities. *See id.* at 432. This tax benefit was one of a number of benefits instituted by Congress in the Taxpayer Relief Act of 1997, but only one of two that the President vetoed. *Id.* In defending the statute, the government argued that the cooperative had not shown that it "would have actually obtained a facility on favorable terms." *Id.* at 433 n. 22. The court rejected this argument, citing *Northeastern Florida* for the proposition that "denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result." *Id.* The farmer's cooperative, consisting of Idaho potato farmers, assuredly was not a member of a suspect classification. We do note that this holding is illustrative of the fact that the line between constitutional and economic injury can sometimes be a bit blurred.

[4] The reasons we have noted above are sufficient to conclude that the district court erred in dismissing the TCTA's complaint for lack of standing and that the case must proceed to the next step. We will, however, briefly note further arguments that defendants make regarding standing. Each lacks merit.

With respect to associational standing, only the third of the three requirements is directly challenged, that is that the individual participation of the members of the association is unnecessary. Member participation is not required here. The TCTA alleges that the Act increases competition for its mem-

E.

Ripeness is the last matter requiring our attention. "To determine if a case is ripe for adjudication, a

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bership. Such allegations are, in the light of *Bennett* and *Marsh*, more than sufficient to establish standing; the participation of the TCTA's members would merely provide more detail to the already sufficient general allegation that the TCTA's members will face increased competition due to the actions of the Texas legislature. Such economic data is not required under *Northeastern Florida* – discrimination and its coordinate loss of opportunity to compete is sufficient.

The defendants also argue that the TCTA has mounted a facial challenge; it therefore must show injury in every application of the Act. For standing purposes, the Supreme Court has said that "[w]hen asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question. In this sense, the threshold for facial challenges is a species of third party (*jus tertii*) standing." *City of Chicago v. Morales*, 527 U.S. 41, 55 n. 22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (plurality opinion). *See also Henderson v. Stalder*, 287 F.3d 374, 385 n. 4 (5th Cir.2002) (Jones, J., concurring); *Thibodeau v. Portuondo*, 486 F.3d 61, 71 (2d Cir.2007). But the TCTA is only asserting the interests of its members in a representational capacity, rather than the interests of third parties not before the court. The proper inquiry is therefore one of associational standing rather than third-party standing. *Cf. United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996) ("Indeed, the entire doctrine of 'representational standing,' of which the notion of 'associational standing' is only one strand, rests on the premise that in certain circumstances, particular relationships (recognized either by common-law tradition or by statute) are sufficient to rebut the background presumption (in the statutory context, about Congress's intent) that litigants may not assert the rights of absent third parties." (footnotes omitted)). In any event, both of the defendants' arguments that the dismissal of the complaint can be justified for failure to satisfy the standards of, first, associational standing, or, second, a facial challenge, lack merit.

court must evaluate (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." *Texas v. United States*, 497 F.3d 491, 498 (5th Cir.2007). The doctrines of ripeness and standing "often overlap in practice, particularly in an examination of whether a plaintiff has suffered a concrete injury." *Id.* at 496. And such is the case here.

The dismissal for lack of ripeness apparently was based in substantial part on a statement made by the TCTA during oral argument before the district court, specifically, its answer that "it's too soon to tell" in response to the district court's questioning regarding the effect of the Act on the profits of the TCTA's members. The district court therefore appears to have concluded on that basis that the level of economic injury suffered by the TCTA's members was not yet discernable and therefore considered them not yet injured; thus the case was not fit for litigation. But, as set out above, allegations of tactile economic harm are not a necessary predicate of a cognizable injury, particularly given the procedural posture of this case at the time of dismissal. As such, no other events needed to have been alleged for the TCTA's stated injury to satisfy Article III requirements. In short, the defendants' ripeness argument lacks merit for essentially the same reasons that we have rejected their standing arguments.

IV.

We thus conclude that the TCTA has alleged injuries sufficient to satisfy the requirements of standing, and its claims are ripe for further proceedings. Accordingly, the judgment of the district court is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

No. A 05 CA 721 LY

TEXAS CABLE & TELECOMMUNICATIONS ASSOCIATION,
Plaintiff,

v.

PAUL HUDSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION OF TEXAS; JULIE PARSLEY, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS; BARRY SMITHERMAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS,
Defendants,

TEXAS COALITION OF CITIES FOR UTILITY ISSUES; GTE SOUTHWEST INC. D/B/A VERIZON SOUTHWEST; SOUTHWESTERN BELL TELEPHONE, L.P. D/B/A SBC TEXAS; GRANDE COMMUNICATIONS NETWORKS, INC.,
Intervenor-Defendants.

Sept. 28, 2006

ORDER

YEAKEL, District Judge.

Before the Court are Defendants' Motion to Dismiss filed November 10, 2005 (Doc. # 6); Motion of Intervenor-Defendant GTE Southwest Inc. d/b/a

Verizon Southwest to Dismiss the Complaint for Failure to State a Claim upon which Relief Can Be Granted filed November 10, 2005 (Doc. # 12); SBC Texas's Motion to Dismiss filed November 10, 2005 (Doc. # 15); Grande Communications Networks, Inc.'s Motion to Dismiss filed November 14, 2005 (Doc. # 40); Motion by Texas Coalition of Cities for Utility Issues for Judgment on the Pleadings filed November 21, 2005 (Doc. # 44); Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss filed January 17, 2006 (Doc. # 53); Grande Communications Networks, Inc.'s Reply Brief in Support of its Motion to Dismiss filed February 17, 2006 (Doc. # 63); TCCFUI's Reply to Cable Association's Response Opposing Dismissal filed February 17, 2006 (Doc. # 67); Reply in Further Support of State's Motion to Dismiss filed February 17, 2006 (Doc. # 68); Reply Memorandum in Further Support of the Motion of Intervenor-Defendant GTE Southwest Inc. d/b/a Verizon Southwest to Dismiss the Complaint for Failure to State a Claim upon which Relief Can Be Granted filed February 17, 2006 (Doc. # 69); and Reply of AT & T Texas in Support of its Motion to Dismiss filed February 17, 2006 (Doc. # 70).

Also before the Court are Plaintiff's Motion for Summary Judgment filed January 17, 2006 (Doc. # 52); TCCFUI's Response to Cable Association's Motion for Summary Judgment filed February 17, 2006 (Doc. # 66); Grande Communications Networks, Inc.'s Response in Opposition to TCTA's Motion for Summary Judgment filed February 24, 2006 (Doc. # 72); Defendants' Opposition to Plaintiff's Motion for Summary Judgment filed February 24, 2006 (Doc. # 74); Memorandum of Intervenor-Defendant GTE Southwest Inc. d/b/a Verizon Southwest in

Opposition to Plaintiff's Motion for Summary Judgment filed February 24, 2006 (Doc. # 75); Opposition of AT&T Texas to Motion of TCTA for Summary Judgment filed February 24, 2006 (Doc. # 76); and Plaintiff's Reply Brief in Support of its Motion for Summary Judgment filed April 5, 2006 (Doc. # 82).

Following the filing of Plaintiff's summary-judgment motion, Grande Communications Networks, Inc. filed a Motion to Strike the Dale Lane Declaration as Summary Judgment Evidence filed February 24, 2006 (Doc. # 73). Plaintiff's Opposition to Grande's Motion to Strike was filed April 5, 2006 (Doc. # 83). Having considered the motion and response, the Court is of the opinion that the motion should be denied.

IT IS THEREFORE ORDERED that Grande Communications Networks, Inc.'s Motion to Strike the Dale Lane Declaration as Summary Judgment Evidence filed February 24, 2006 (Doc. # 73) is **DENIED.**

A hearing on the above-listed motions was held before the Court on May 22, 2006. At the conclusion of the hearing, the parties filed the following post-hearing letter briefs: TCCFUI's letter brief dated May 25, 2006, received by the Court on May 25, 2006; AT&T Texas's letter brief filed May 26, 2006 (Doc. # 86); Grande Communications Networks, Inc.'s letter brief filed May 31, 2006 (Doc. # 87); Intervenor-Defendant GTE Southwest Inc. d/b/a Verizon Southwest's letter brief filed May 31, 2006 (Doc. # 88); State Defendants' letter brief filed June 2, 2006 (Doc. # 89); and Plaintiff's letter brief filed June 9, 2006 (Doc. # 90).

I. Background

Plaintiff Texas Cable & Telecommunications Association ("TCTA"), a trade organization representing incumbent cable operators in Texas, filed this lawsuit challenging the "Act Relating to Furthering Competition in the Communications Industry," S.B. 5, 79th Leg., 2d Sess. (Texas 2005) (the "Act"), an act of the Texas Legislature that went into effect on September 7, 2005. The Act amends Subtitle C, Title 2, of the Texas Utilities Code by adding a new Chapter 66 entitled "State-Issued Cable and Video Franchise." *See* TEX. UTIL. CODE ANN. § 66.003(b), (c) (West Supp.2006). According to TCTA, the Act allows new entrants to obtain Texas Public Utility Commission ("PUC")-issued franchises and allows overbuilders to obtain PUC-issued franchises after renouncing their municipal franchises. At the same time, TCTA argues, the Act locks incumbent cable operators into existing municipal franchises. Even after incumbent cable operators become eligible for PUC-issued franchises, TCTA contends, the Act subjects them to more onerous franchising terms.

On September 8, 2005, the day after the Governor of the State of Texas signed the Act, TCTA filed this action against the Governor and each of the PUC Commissioners, alleging the following four counts: (1) Count I charged that the Act's disparate treatment of, on the one hand, new entrants and overbuilders, and, on the other hand, incumbent cable operators, lacks any appropriate justification and therefore violates applicable protections under the First Amendment, the Due Process Clause, and the Equal Protection Clause of the United States Constitution; (2) Count II charged that the same disparate treatment conflicts with Title VI of the Federal

Communications Act and is therefore preempted in violation of the Supremacy Clause of the United States Constitution; (3) Count III charged that Section 66.004(b), which renders incumbents ineligible for a state-issued franchise, is preempted as conflicting with Section 621(a)(1) of the Federal Communications Act, 47 U.S.C. § 541(a)(1) in violation of the Supremacy Clause of the United States Constitution; and (4) Count IV charged that, insofar as the Act prohibits the PUC from imposing anti-redlining assurances, it is preempted by Section 621(a)(3) of the Federal Communications Act, 47 U.S.C. § 541(a)(3) in violation of the Supremacy Clause of the United States Constitution.

Four parties subsequently intervened as Defendants: (1) Grande Communications Networks, Inc.; (2) GTE Southwest Inc. d/b/a Verizon Southwest; (3) Southwestern Bell Telephone, L.P., d/b/a SBC Texas ("SBC Texas"); and (4) the Coalition of Cities for Utility Issues ("TCCFUI"). Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, each Defendant and Intervenor-Defendant filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. The only exception was TCCFUI, which, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, filed a motion for judgment on the pleadings. In that motion, TCCFUI notes that the standard for considering its motion is identical to that of Defendants' motions to dismiss. Plaintiff TCTA also filed a motion for summary judgment. The Court will address the motions to dismiss first.

II. Analysis

In ruling on a motion to dismiss for failure to state a claim, the Court must test the formal sufficiency of

the statement of the claim for relief. *See Doe v. Hillsboro ISD*, 81 F.3d 1395, 1401-02 (5th Cir.1996). All well-pleaded facts must be accepted as true and viewed in the light most favorable to the plaintiff. *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir.1999); *Hillsboro ISD*, 81 F.3d at 1401-02 (citing *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir.1995)). A Rule 12(b)(6) motion to dismiss should be granted when the complaint lacks a cognizable legal theory or fails to set forth facts sufficient to support a legal theory. 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil 2d* § 1357 at 340 (1990 & Supp.2003 at 361). The issue is not whether a plaintiff will ultimately prevail but whether it is entitled to offer evidence to support its claims. *Hillsboro ISD*, 81 F.3d at 1401. The Court should dismiss for failure to state a claim only if the court can determine to a certainty that the plaintiff cannot prove any set of facts that would allow relief under the allegations in the complaint. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). In determining whether a claimant has pleaded sufficient facts, only specific facts, not mere conclusory allegations or unwarranted deductions, are accepted as true and are considered. *See Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1067 (5th Cir.1994).

In its motion to dismiss, SBC Texas argues that TCTA's claims cannot be considered by the Court until TCTA can present a specific controversy for judicial resolution. *See United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). A facial challenge to a legislative act is the most difficult challenge to mount successfully because the challenger must establish that no set of circum-

stances exists under which the act would be valid. *See United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The fact that an act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. *See id.* In the instant cause, TCTA's evidence falls short of establishing that the Act will inflict inevitable or even probable harm on its member cable operators at this time.

In reviewing a preemption-based facial challenge, the Court does "not rest [its] decision on consequences that, while possible, are by no means predictable." *Department of Taxation & Finance of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 69, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994). The very foundation of the power of the federal courts to declare statutes unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. *See United States v. Raines*, 362 U.S. 17, 20, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). Thus, this Court has no jurisdiction to pronounce any statute unconstitutional, except as it is called upon to adjudge the legal rights of litigants in actual controversies. *See id.* at 21, 80 S.Ct. 519. In the exercise of that jurisdiction, the Court is bound by two rules: (1) not to anticipate a question of constitutional law in advance of the necessity of deciding it, and (2) not to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *See id.* Most significant is the incontrovertible proposition that it "would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *Barrows v. Jackson*, 346 U.S. 249, 256, 73 S.Ct. 1031,

97 L.Ed. 1586 (1953). Nor would the Court be ready to frustrate the expressed will of a state legislature. *See id.* at 256-57, 73 S.Ct. 1031 (citing *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 172, 59 S.Ct. 389, 83 L.Ed. 586 (1939)). The delicate power of pronouncing an act unconstitutional is not to be exercised with reference to hypothetical cases or possible scenarios. *See Raines*, 362 U.S. at 22, 80 S.Ct. 519. The application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy. *See id.*

TCTA's concessions before the Court at the May 22, 2006 hearing that it is too soon to tell what economic impact the Act will have and to what extent there is disparate treatment of incumbent cable providers are fatal to its constitutional challenges under the First Amendment, Due Process and Equal Protection Clauses, and the Supremacy Clause of the United States Constitution in all four counts in its complaint. In other words, TCTA cannot identify any concrete cognizable harm suffered by any of its members, having stated only that it is "too early to tell" the economic impact of the Act. Until TCTA can establish the Act's harmful impact on its incumbent cable providers, TCTA's claims are not ripe for the Court's consideration. Therefore, the Court shall dismiss all TCTA's claims as premature.

III. Conclusion

The Court **ORDERS** that SBC Texas's Motion to Dismiss filed November 10, 2005 (Doc. # 15) is **GRANTED** as to all Defendants and Intervenor-Defendants. Plaintiff Texas Cable & Telecommunications Association's claims against Defendants Rick

Perry, Paul Hudson, Julie Parsley, and Barry Smitherman and Intervenor-Defendants GTE Southwest Inc. d/b/a Verizon Southwest, Southwestern Bell Telephone, L.P. d/b/a SBC Texas, Grande Communications Networks, Inc., and the Texas Coalition of Cities for Utility Issues are **DISMISSED WITHOUT PREJUDICE**.

Having granted Intervenor-Defendant GTE Southwest Inc. d/b/a Verizon Southwest's motion to dismiss as to all Defendants and Intervenor-Defendants in this cause, the Court **FURTHER ORDERS** the following motions **DISMISSED**: Defendants' Motion to Dismiss filed November 10, 2005 (Doc. # 6); the Motion of Intervenor-Defendant GTE Southwest Inc. d/b/a Verizon Southwest to Dismiss the Complaint for Failure to State a Claim upon which Relief Can Be Granted filed November 10, 2005 (Doc. # 12); Grande Communications Networks, Inc.'s Motion to Dismiss filed November 14, 2005 (Doc. # 40); and Motion by Texas Coalition of Cities for Utility Issues for Judgment on the Pleadings filed November 21, 2005 (Doc. # 44).

In light of the Court's dismissal of all claims without prejudice, the Court **FURTHER ORDERS** that Plaintiff's Motion for Summary Judgment filed January 17, 2006 (Doc. # 52) is **DISMISSED**.

The Court **FINALLY ORDERS** that all further relief not expressly granted is **DENIED**.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-51514

TEXAS CABLE & TELECOMMUNICATIONS ASSOCIATION,
Plaintiff-Appellant,

v.

PAUL HUDSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION OF TEXAS; JULIE PARSLEY, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS; BARRY SMITHERMAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS,
Defendants-Appellees,

AND

TEXAS COALITION OF CITIES FOR UTILITY ISSUES; GTE SOUTHWEST INC. D/B/A VERIZON SOUTHWEST; SOUTHWESTERN BELL TELEPHONE, L.P. D/B/A SBC TEXAS; GRANDE COMMUNICATIONS NETWORKS, INC.,
Intervenor Defendants-Appellees.

Mar. 14, 2008

Appeal from the United States District Court
for the Western District of Texas, Austin

ON PETITION FOR REHEARING

Before JOLLY, DAVIS and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing of GTE Southwest Inc. doing business as Verizon Southwest is DENIED.

ENTERED FOR THE COURT:

/s/ E. GRADY JOLLY

United States Circuit Judge

UNITED STATES COURT OF APPEALS
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PAUL HUDSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION OF TEXAS; JULIE PARSLEY, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS; BARRY SMITHERMAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS,
Defendants-Appellees,

AND

TEXAS COALITION OF CITIES FOR UTILITY ISSUES; GTE SOUTHWEST INC. D/B/A VERIZON SOUTHWEST; SOUTHWESTERN BELL TELEPHONE, L.P. D/B/A SBC TEXAS; GRANDE COMMUNICATIONS NETWORKS, INC.,
Intervenor Defendants-Appellees.

Mar. 14, 2008

Appeal from the United States District Court
for the Western District of Texas, Austin

ON PETITION FOR REHEARING EN BANC

(Opinion 2/7/08, 5 Cir., _____, _____ F.3d _____)

Before JOLLY, DAVIS and WIENER

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc of Southwestern Bell Telephone LP, doing business as SBC Texas as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc of Southwestern Bell Telephone LP, doing business as SBC Texas as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. GRADY JOLLY

United States Circuit Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, Art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Free Speech Clause of the First Amendment to the United States Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment to the United States Constitution provide:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 621 of the Communications Act of 193 47 U.S.C. § 541, provides:

§ 541. General franchise requirements

(a) Authority to award franchises; public rights-of-way and easements; equal access to service; time for provision of service; assurances

(1) A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 555 of this title for failure to comply with this subsection.

(2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure –

(A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

(3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

(4) In awarding a franchise, the franchising authority –

(A) shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;

(B) may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; and

(C) may require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.

(b) No cable service without franchise; exception under prior law

(1) Except to the extent provided in paragraph (2) and subsection (f) of this section, a cable operator may not provide cable service without a franchise.

(2) Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires.

(3)(A) If a cable operator or affiliate thereof is engaged in the provision of telecommunications services –

(i) such cable operator or affiliate shall not be required to obtain a franchise under this subchapter for the provision of telecommunications services; and

(ii) the provisions of this subchapter shall not apply to such cable operator or affiliate for the provision of telecommunications services.

(B) A franchising authority may not impose any requirement under this subchapter that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.

(C) A franchising authority may not order a cable operator or affiliate thereof –

(i) to discontinue the provision of a telecommunications service, or

(ii) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal under this subchapter with respect to the provision of such telecommunications service.

(D) Except as otherwise permitted by sections 531 and 532 of this title, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.

(c) Status of cable system as common carrier or utility

Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

(d) Informational tariffs; regulation by States; "State" defined

(1) A State or the Commission may require the filing of informational tariffs for any intrastate communications service provided by a cable system, other than cable service, that would be subject to regulation by the Commission or any State if offered by a common carrier subject, in whole or in part, to subchapter II of this chapter. Such informational tariffs shall specify the rates, terms, and conditions for the provision of such service, including whether it is made available to all subscribers generally, and shall take effect on the date specified therein.

(2) Nothing in this subchapter shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis.

(3) For purposes of this subsection, the term "State" has the meaning given it in section 153 of this title.

(e) State regulation of facilities serving subscribers in multiple dwelling units

Nothing in this subchapter shall be construed to affect the authority of any State to license or otherwise regulate any facility or combination of facilities which serves only subscribers in one or more multiple unit dwellings under common ownership, control,

or management and which does not use any public right-of-way.

(f) Local or municipal authority as multichannel video programming distributor

No provision of this chapter shall be construed to –

(1) prohibit a local or municipal authority that is also, or is affiliated with, a franchising authority from operating as a multichannel video programming distributor in the franchise area, notwithstanding the granting of one or more franchises by such franchising authority; or

(2) require such local or municipal authority to secure a franchise to operate as a multichannel video programming distributor.

TEXAS UTILITIES CODE

CHAPTER 66. STATE-ISSUED CABLE AND VIDEO FRANCHISE

Sec. 66.001. FRANCHISING AUTHORITY. The commission shall be designated as the franchising authority for a state-issued franchise for the provision of cable service or video service.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.002. DEFINITIONS. In this chapter:

(1) "Actual incremental cost" means only current out-of-pocket expenses for labor, equipment repair, equipment replacement, and tax expenses directly associated with the labor or the equipment of a service provider that is necessarily and directly used to provide what were, under a superseded franchise, in-kind services, exclusive of any profit or overhead such as depreciation, amortization, or administrative expense.

(2) "Cable service" is defined as set forth in 47 U.S.C. Section 522(6).

(3) "Cable service provider" means a person who provides cable service.

(4) "Communications network" means a component or facility that is, wholly or partly, physically located within a public right-of-way and that is used to provide video programming, cable, voice, or data services.

(5) "Franchise" means an initial authorization, or renewal of an authorization, issued by a franchising authority, regardless of whether the authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, that

authorizes the construction and operation of a cable or video services network in the public rights-of-way.

(6)(A) "Gross revenues" means all consideration of any kind or nature including without limitation cash, credits, property, and in-kind contributions (services or goods) derived by the holder of a state-issued certificate of franchise authority from the operation of the cable service provider's or the video service provider's network to provide cable service or video service within the municipality. Gross revenue shall include all consideration paid to the holder of a state-issued certificate of franchise authority and its affiliates (to the extent either is acting as a provider of a cable service or video service as authorized by this chapter), which shall include but not be limited to the following: (i) all fees charged to subscribers for any and all cable service or video service provided by the holder of a state-issued certificate of franchise authority; (ii) any fee imposed on the holder of a state-issued certificate of franchise authority by this chapter that is passed through and paid by subscribers (including without limitation the franchise fee set forth in this chapter); and (iii) compensation received by the holder of a state-issued certificate of franchise authority or its affiliates that is derived from the operation of the holder of a state-issued certificate of franchise authority's network to provide cable service or video service with respect to commissions that are paid to the holder of a state-issued certificate of franchise authority as compensation for promotion or exhibition of any products or services on the holder of a state-issued certificate of franchise authority's network, such as a "home shopping" or a similar channel, subject to Paragraph (B)(v). Gross revenue includes a pro rata portion of all revenue derived by the

holder of a state-issued certificate of franchise authority or its affiliates pursuant to compensation arrangements for advertising derived from the operation of the holder of a state-issued certificate of franchise authority's network to provide cable service or the video service within a municipality, subject to Paragraph (B)(iii). The allocation shall be based on the number of subscribers in the municipality divided by the total number of subscribers in relation to the relevant regional or national compensation arrangement. Advertising commissions paid to third parties shall not be netted against advertising revenue included in gross revenue. Revenue of an affiliate derived from the affiliate's provision of cable service or the video service shall be gross revenue to the extent the treatment of such revenue as revenue of the affiliate and not of the holder of a state-issued certificate of franchise authority has the effect (whether intentional or unintentional) of evading the payment of fees which would otherwise be paid to the municipality. In no event shall revenue of an affiliate be gross revenue to the holder of a state-issued certificate of franchise authority if such revenue is otherwise subject to fees to be paid to the municipality.

(B) For purposes of this section, "gross revenues" does not include:

(i) any revenue not actually received, even if billed, such as bad debt;

(ii) non-cable services or non-video services revenues received by any affiliate or any other person in exchange for supplying goods or services used by the holder of a state-issued certificate of franchise authority to provide cable service or video service;

(iii) refunds, rebates, or discounts made to subscribers, leased access providers, advertisers, or a municipality;

(iv) any revenues from services classified as non-cable service or non-video service under federal law including without limitation revenue received from telecommunications services; revenue received from information services (but not excluding cable services or video services); and any other revenues attributed by the holder of a state-issued certificate of franchise authority to non-cable service or non-video service in accordance with Federal Communications Commission or commission rules, regulations, standards, or orders;

(v) any revenue paid by subscribers to home shopping programmers directly from the sale of merchandise through any home shopping channel offered as part of the cable services or video services, but not excluding any commissions that are paid to the holder of a state-issued certificate of franchise authority as compensation for promotion or exhibition of any products or services on the holder of a state-issued certificate of franchise authority's network, such as a "home shopping" or a similar channel;

(vi) the sale of cable services or video services for resale in which the purchaser is required to collect this chapter's fees from the purchaser's customer. Nothing under this chapter is intended to limit state's rights pursuant to 47 U.S.C. Section 542(h);

(vii) the provision of cable services or video services to customers at no charge, as required or allowed by this chapter, including without limitation the provision of cable services or video services to public institutions, as required or permitted in

this chapter, including without limitation public schools or governmental entities, as required or permitted in this chapter;

(viii) any tax of general applicability imposed upon the holder of a state-issued certificate of franchise authority or upon subscribers by a city, state, federal, or any other governmental entity and required to be collected by the holder of a state-issued certificate of franchise authority and remitted to the taxing entity (including, but not limited to, sales and use tax, gross receipts tax, excise tax, utility users tax, public service tax, communication taxes, and fees not imposed by this chapter);

(ix) any forgone revenue from the holder of a state-issued certificate of franchise authority's provision of free or reduced cost cable services or video services to any person including without limitation employees of the holder of a state-issued certificate of franchise authority, to the municipality and other public institutions or other institutions as allowed in this chapter; provided, however, that any forgone revenue which the holder of a state-issued certificate of franchise authority chooses not to receive in exchange for trades, barters, services, or other items of value shall be included in gross revenue;

(x) sales of capital assets or sales of surplus equipment that is not used by the purchaser to receive cable services or video services from the holder of a state-issued certificate of franchise authority;

(xi) directory or Internet advertising revenue including, but not limited to, yellow pages, white pages, banner advertisement, and electronic publishing; and

(xii) reimbursement by programmers of marketing costs incurred by the holder of a state-issued franchise for the introduction of new programming that exceed the actual costs.

(C) For purposes of this definition, a provider's network consists solely of the optical spectrum wavelengths, bandwidth, or other current or future technological capacity used for the transmission of video programming over wireline directly to subscribers within the geographic area within the municipality as designated by the provider in its franchise.

(7) "Incumbent cable service provider" means the cable service provider serving the largest number of cable subscribers in a particular municipal franchise area on September 1, 2005.

(8) "Public right-of-way" means the area on, below, or above a public roadway, highway, street, public sidewalk, alley, waterway, or utility easement in which a municipality has an interest.

(9) "Video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station, as set forth in 47 U.S.C. Section 522(20).

(10) "Video service" means video programming services provided through wireline facilities located at least in part in the public right-of-way without regard to delivery technology, including Internet protocol technology. This definition does not include any video service provided by a commercial mobile service provider as defined in 47 U.S.C. Section 332(d).

(11) "Video service provider" means a video programming distributor that distributes video programming services through wireline facilities located at least in part in the public right-of-way without

regard to delivery technology. This term does not include a cable service provider.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.003. STATE AUTHORIZATION TO PROVIDE CABLE SERVICE OR VIDEO SERVICE. (a) An entity or person seeking to provide cable service or video service in this state after September 1, 2005, shall file an application for a state-issued certificate of franchise authority with the commission as required by this section. An entity providing cable service or video service under a franchise agreement with a municipality is not subject to this subsection with respect to such municipality until the franchise agreement expires, except as provided by Section 66.004.

(a-1) The commission shall notify an applicant for a state-issued certificate of franchise authority whether the applicant's affidavit described by Subsection (b) is complete before the 15th business day after the applicant submits the affidavit.

(b) The commission shall issue a certificate of franchise authority to offer cable service or video service before the 17th business day after receipt of a completed affidavit submitted by the applicant and signed by an officer or general partner of the applicant affirming:

(1) that the applicant has filed or will timely file with the Federal Communications Commission all forms required by that agency in advance of offering cable service or video service in this state;

(2) that the applicant agrees to comply with all applicable federal and state statutes and regulations;

(3) that the applicant agrees to comply with all applicable municipal regulations regarding the use and occupation of public rights-of-way in the delivery of the cable service or video service, including the police powers of the municipalities in which the service is delivered;

(4) a description of the service area footprint to be served within the municipality, if applicable, otherwise the municipality to be served by the applicant, which may include certain designations of unincorporated areas, which description shall be updated by the applicant prior to the expansion of cable service or video service to a previously undesignated service area and, upon such expansion, notice to the commission of the service area to be served by the applicant; and

(5) the location of the applicant's principal place of business and the names of the applicant's principal executive officers.

(c) The certificate of franchise authority issued by the commission shall contain:

(1) a grant of authority to provide cable service or video service as requested in the application;

(2) a grant of authority to use and occupy the public rights-of-way in the delivery of that service, subject to the laws of this state, including the police powers of the municipalities in which the service is delivered; and

(3) a statement that the grant of authority is subject to lawful operation of the cable service or video service by the applicant or its successor in interest.

(d) The certificate of franchise authority issued by the commission is fully transferable to any successor in interest to the applicant to which it is initially

granted. A notice of transfer shall be filed with the commission and the relevant municipality within 14 business days of the completion of such transfer.

(e) The certificate of franchise authority issued by the commission may be terminated by the cable service provider or video service provider by submitting notice to the commission.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.004. ELIGIBILITY FOR COMMISSION-ISSUED FRANCHISE. (a) A cable service provider or a video service provider that currently has or had previously received a franchise to provide cable service or video service with respect to such municipalities is not eligible to seek a state-issued certificate of franchise authority under this chapter as to those municipalities until the expiration date of the existing franchise agreement, except as provided by Subsections (b) and (c).

(b) Beginning September 1, 2005, a cable service provider or video service provider that is not the incumbent cable service provider and serves fewer than 40 percent of the total cable customers in a particular municipal franchise area may elect to terminate that municipal franchise and seek a state-issued certificate of franchise authority by providing written notice to the commission and the affected municipality before January 1, 2006. The municipal franchise is terminated on the date the commission issues the state-issued certificate of franchise authority.

(c) A cable service provider that serves fewer than 40 percent of the total cable customers in a municipal franchise area and that elects under Subsection (b) to terminate an existing municipal franchise is respon-

sible for remitting to the affected municipality before the 91st day after the date the municipal franchise is terminated any accrued but unpaid franchise fees due under the terminated franchise. If the cable service provider has credit remaining from prepaid franchise fees, the provider may deduct the amount of the remaining credit from any future fees or taxes it must pay to the municipality, either directly or through the comptroller.

(d) For purposes of this section, a cable service provider or video service provider will be deemed to have or have had a franchise to provide cable service or video service in a specific municipality if any affiliates or successor entity of the cable or video provider has or had a franchise agreement granted by that specific municipality.

(e) The terms "affiliates or successor entity" in this section shall include but not be limited to any entity receiving, obtaining, or operating under a municipal cable or video franchise through merger, sale, assignment, restructuring, or any other type of transaction.

(f) Except as provided in this chapter, nothing in this chapter is intended to abrogate, nullify, or adversely affect in any way the contractual rights, duties, and obligations existing and incurred by a cable service provider or a video service provider before the enactment of this chapter, and owed or owing to any private person, firm, partnership, corporation, or other entity including without limitation those obligations measured by and related to the gross revenue hereafter received by the holder of a state-issued certificate of franchise authority for services provided in the geographic area to which such prior franchise or permit applies. All liens, security

interests, royalties, and other contracts, rights, and interests in effect on September 1, 2005, shall continue in full force and effect, without the necessity for renewal, extension, or continuance, and shall be paid and performed by the holder of a state-issued certificate of franchise authority, and shall apply as though the revenue generated by the holder of a state-issued certificate of franchise authority continued to be generated pursuant to the permit or franchise issued by the prior local franchising authority or municipality within the geographic area to which the prior permit or franchise applies. It shall be a condition to the issuance and continuance of a state-issued certificate of franchise authority that the private contractual rights and obligations herein described continue to be honored, paid, or performed to the same extent as though the cable service provider continued to operate under its prior franchise or permit, for the duration of such state-issued certificate of franchise authority and any renewals or extensions thereof, and that the applicant so agrees. Any person, firm, partnership, corporation, or other entity holding or claiming rights herein reserved may enforce same by an action brought in a court of competent jurisdiction.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.005. FRANCHISE FEE. (a) The holder of a state-issued certificate of franchise authority shall pay each municipality in which it provides cable service or video service a franchise fee of five percent based upon the definition of gross revenues as set forth in this chapter. That same franchise fee structure shall apply to any unincorporated areas that are

annexed by a municipality after the effective date of the state-issued certificate of franchise authority.

(b) The franchise fee payable under this section is to be paid quarterly, within 45 days after the end of the quarter for the preceding calendar quarter. Each payment shall be accompanied by a summary explaining the basis for the calculation of the fee. A municipality may review the business records of the cable service provider or video service provider to the extent necessary to ensure compensation in accordance with Subsection (a). Each party shall bear the party's own costs of the examination. A municipality may, in the event of a dispute concerning compensation under this section, bring an action in a court of competent jurisdiction.

(c) The holder of a state-issued certificate of franchise authority may recover from the provider's customers any fee imposed by this chapter.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.006. IN-KIND CONTRIBUTIONS TO MUNICIPALITY. (a) Until the expiration of the incumbent cable service provider's agreement, the holder of a state-issued certificate of franchise authority shall pay a municipality in which it is offering cable service or video service the same cash payments on a per subscriber basis as required by the incumbent cable service provider's franchise agreement. All cable service providers and all video service providers shall report quarterly to the municipality the total number of subscribers served within the municipality. The amount paid by the holder of a state-issued certificate of franchise authority shall be calculated quarterly by the municipality by multiply-

ing the amount of cash payment under the incumbent cable service provider's franchise agreement by a number derived by dividing the number of subscribers served by a video service provider or cable service provider by the total number of video or cable service subscribers in the municipality. Such pro rata payments are to be paid quarterly to the municipality within 45 days after the end of the quarter for the preceding calendar quarter.

(b) On the expiration of the incumbent cable service provider's agreement, the holder of a state-issued certificate of franchise authority shall pay a municipality in which it is offering cable service or video service one percent of the provider's gross revenues, as defined by this chapter, or at the municipality's election, the per subscriber fee that was paid to the municipality under the expired incumbent cable service provider's agreement, in lieu of in-kind compensation and grants. Payments under this subsection shall be paid in the same manner as outlined in Section 66.005(b).

(c) All fees paid to municipalities under this section are paid in accordance with 47 U.S.C. Sections 531 and 541(a)(4)(B) and may be used by the municipality as allowed by federal law; further, these payments are not chargeable as a credit against the franchise fee payments authorized under this chapter.

(d) The following services shall continue to be provided by the cable provider that was furnishing services pursuant to its municipal cable franchise until January 1, 2008, or until the term of the franchise was to expire, whichever is later, and thereafter as provided in Subdivisions (1) and (2) below:

(1) institutional network capacity, however defined or referred to in the municipal cable franchise but generally referring to a private line data network capacity for use by the municipality for noncommercial purposes, shall continue to be provided at the same capacity as was provided to the municipality prior to the date of the termination, provided that the municipality will compensate the provider for the actual incremental cost of the capacity; and

(2) cable services to community public buildings, such as municipal buildings and public schools, shall continue to be provided to the same extent provided immediately prior to the date of the termination. Beginning on January 1, 2008, or the expiration of the franchise agreement, whichever is later, a provider that provides the services may deduct from the franchise fee to be paid to the municipality an amount equal to the actual incremental cost of the services if the municipality requires the services after that date. Such cable service generally refers to the existing cable drop connections to such facilities and the tier of cable service provided pursuant to the franchise at the time of the termination.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.007. BUILD-OUT. The holder of a state-issued certificate of franchise authority shall not be required to comply with mandatory build-out provisions.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.008. CUSTOMER SERVICE STANDARDS. The holder of a state-issued certificate of franchise authority shall comply with customer service requirements consistent with 47 C.F.R. Section 76.309(c) until there are two or more providers offering service, excluding direct-to-home satellite service, in the relevant municipality.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.009. PUBLIC, EDUCATIONAL, AND GOVERNMENTAL ACCESS CHANNELS. (a) Not later than 120 days after a request by a municipality, the holder of a state-issued certificate of franchise authority shall provide the municipality with capacity in its communications network to allow public, educational, and governmental (PEG) access channels for noncommercial programming.

(b) The holder of a state-issued certificate of franchise authority shall provide no fewer than the number of PEG access channels a municipality has activated under the incumbent cable service provider's franchise agreement as of September 1, 2005.

(c) If a municipality did not have PEG access channels as of September 1, 2005, the cable service provider or video service provider shall furnish:

(1) up to three PEG channels for a municipality with a population of at least 50,000; and

(2) up to two PEG channels for a municipality with a population of less than 50,000.

(d) Any PEG channel provided pursuant to this section that is not utilized by the municipality for at least eight hours a day shall no longer be made available to the municipality, but may be

programmed at the cable service provider's or video service provider's discretion. At such time as the municipality can certify to the cable service provider or video service provider a schedule for at least eight hours of daily programming, the cable service provider or video service provider shall restore the previously lost channel but shall be under no obligation to carry that channel on a basic or analog tier.

(e) In the event a municipality has not utilized the minimum number of access channels as permitted by Subsection (c), access to the additional channel capacity allowed in Subsection (c) shall be provided upon 90 days' written notice if the municipality meets the following standard: if a municipality has one active PEG channel and wishes to activate an additional PEG channel, the initial channel shall be considered to be substantially utilized when 12 hours are programmed on that channel each calendar day. In addition, at least 40 percent of the 12 hours of programming for each business day on average over each calendar quarter must be nonrepeat programming. Nonrepeat programming shall include the first three video-castings of a program. If a municipality is entitled to three PEG channels under Subsection (c) and has in service two active PEG channels, each of the two active channels shall be considered to be substantially utilized when 12 hours are programmed on each channel each calendar day and at least 50 percent of the 12 hours of programming for each business day on average over each calendar quarter is nonrepeat programming for three consecutive calendar quarters.

(f) The operation of any PEG access channel provided pursuant to this section shall be the responsibility of the municipality receiving the benefit of such

channel, and the holder of a state-issued certificate of franchise authority bears only the responsibility for the transmission of such channel. The holder of a state-issued certificate of franchise authority shall be responsible for providing the connectivity to each PEG access channel distribution point up to the first 200 feet.

(g) The municipality must ensure that all transmissions, content, or programming to be transmitted over a channel or facility by a holder of a state-issued certificate of franchise authority are provided or submitted to the cable service provider or video service provider in a manner or form that is capable of being accepted and transmitted by a provider, without requirement for additional alteration or change in the content by the provider, over the particular network of the cable service provider or video service provider, which is compatible with the technology or protocol utilized by the cable service provider or video service provider to deliver services.

(h) Where technically feasible, the holder of a state-issued certificate of franchise authority and an incumbent cable service provider shall use reasonable efforts to interconnect their cable or video systems for the purpose of providing PEG programming. Interconnection may be accomplished by direct cable, microwave link, satellite, or other reasonable method of connection. Holders of a state-issued certificate of franchise authority and incumbent cable service providers shall negotiate in good faith and incumbent cable service providers may not withhold interconnection of PEG channels.

(i) A court of competent jurisdiction shall have exclusive jurisdiction to enforce any requirement under this section.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.010. NONDISCRIMINATION BY MUNICIPALITY. (a) A municipality shall allow the holder of a state-issued certificate of franchise authority to install, construct, and maintain a communications network within a public right-of-way and shall provide the holder of a state-issued certificate of franchise authority with open, comparable, nondiscriminatory, and competitively neutral access to the public right-of-way. All use of a public right-of-way by the holder of a state-issued certificate of franchise authority is nonexclusive and subject to Section 66.011.

(b) A municipality may not discriminate against the holder of a state-issued certificate of franchise authority regarding:

(1) the authorization or placement of a communications network in a public right-of-way;

(2) access to a building; or

(3) a municipal utility pole attachment term.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.011. MUNICIPAL POLICE POWER; OTHER AUTHORITY. (a) A municipality may enforce police power-based regulations in the management of a public right-of-way that apply to the holder of a state-issued certificate of franchise authority within the municipality. A municipality may enforce police power-based regulations in the management of

the activities of the holder of a state-issued certificate of franchise authority to the extent that they are reasonably necessary to protect the health, safety, and welfare of the public. Police power-based regulation of the holder of a state-issued certificate of franchise authority's use of the public right-of-way must be competitively neutral and may not be unreasonable or discriminatory. A municipality may not impose on activities of the holder of a state-issued certificate of franchise authority a requirement:

(1) that particular business offices be located in the municipality;

(2) regarding the filing of reports and documents with the municipality that are not required by state or federal law and that are not related to the use of the public right-of-way except that a municipality may request maps and records maintained in the ordinary course of business for purposes of locating the portions of a communications network that occupy public rights-of-way. Any maps or records of the location of a communications network received by a municipality shall be confidential and exempt from disclosure under Chapter 552, Government Code, and may be used by a municipality only for the purpose of planning and managing construction activity in the public right-of-way. A municipality may not request information concerning the capacity or technical configuration of the holder of a state-issued certificate of franchise authority's facilities;

(3) for the inspection of the holder of a state-issued certificate of franchise authority's business records except to extent permitted under Section 66.005(b);

(4) for the approval of transfers of ownership or control of the holder of a state-issued certificate of franchise authority's business, except that a municipality may require that the holder of a state-issued certificate of franchise authority maintain a current point of contact and provide notice of a transfer within a reasonable time; or

(5) that the holder of a state-issued certificate of franchise authority that is self-insured under the provisions of state law obtain insurance or bonding for any activities within the municipality, except that a self-insured provider shall provide substantially the same defense and claims processing as an insured provider. A bond may not be required from a provider for any work consisting of aerial construction except that a reasonable bond may be required of a provider that cannot demonstrate a record of at least four years' performance of work in any municipal public right-of-way free of currently unsatisfied claims by a municipality for damage to the right-of-way.

(b) Notwithstanding any other law, a municipality may require the issuance of a construction permit, without cost, to the holder of a state-issued certificate of franchise authority that is locating facilities in or on a public right-of-way in the municipality. The terms of the permit shall be consistent with construction permits issued to other persons excavating in a public right-of-way.

(c) In the exercise of its lawful regulatory authority, a municipality shall promptly process all valid and administratively complete applications of the holder of a state-issued certificate of franchise authority for a permit, license, or consent to excavate, set poles, locate lines, construct facilities, make

repairs, affect traffic flow, or obtain zoning or subdivision regulation approvals or other similar approvals. A municipality shall make every reasonable effort not to delay or unduly burden the provider in the timely conduct of the provider's business.

(d) If there is an emergency necessitating response work or repair, the holder of a state-issued certificate of franchise authority may begin the repair or emergency response work or take any action required under the circumstances without prior approval from the affected municipality, if the holder of a state-issued certificate of franchise authority notifies the municipality as promptly as possible after beginning the work and later obtains any approval required by a municipal ordinance applicable to emergency response work.

(e) The commission shall have no jurisdiction to review such police power-based regulations and ordinances adopted by a municipality to manage the public rights-of-way.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.012. INDEMNITY IN CONNECTION WITH RIGHT-OF-WAY; NOTICE OF LIABILITY. (a) The holder of a state-issued certificate of franchise authority shall indemnify and hold a municipality and its officers and employees harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees (including reasonable attorney's fees and costs of defense), proceedings, actions, demands, causes of action, liability, and suits of any kind and nature, including personal or bodily injury (including death), property damage, or other harm for which recovery of damages is sought, that

is found by a court of competent jurisdiction to be caused solely by the negligent act, error, or omission of the holder of a state-issued certificate of franchise authority or any agent, officer, director, representative, employee, affiliate, or subcontractor of the holder of a state-issued certificate of franchise authority or their respective officers, agents, employees, directors, or representatives, while installing, repairing, or maintaining facilities in a public right-of-way. The indemnity provided by this subsection does not apply to any liability resulting from the negligence of the municipality or its officers, employees, contractors, or subcontractors. If the holder of a state-issued certificate of franchise authority and the municipality are found jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the laws of this state without, however, waiving any governmental immunity available to the municipality under state law and without waiving any defenses of the parties under state law. This subsection is solely for the benefit of the municipality and the holder of a state-issued certificate of franchise authority and does not create or grant any rights, contractual or otherwise, for or to any other person or entity.

(b) The holder of a state-issued certificate of franchise authority and a municipality shall promptly advise the other in writing of any known claim or demand against the holder of a state-issued certificate of franchise authority or the municipality related to or arising out of the holder of a state-issued certificate of franchise authority's activities in a public right-of-way.

(c) The commission shall have no jurisdiction to review such police power-based regulations and ordi-

nances adopted by a municipality to manage the public rights-of-way.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.013. MUNICIPAL AUTHORITY. In addition to a municipality's authority to exercise its nondiscriminatory police power with respect to public rights-of-way under current law, a municipality's authority to regulate the holder of state-issued certificate of franchise authority is limited to:

(1) a requirement that the holder of a state-issued certificate of franchise authority who is providing cable service or video service within the municipality register with the municipality and maintain a point of contact;

(2) the establishment of reasonable guidelines regarding the use of public, educational, and governmental access channels; and

(3) submitting reports within 30 days on the customer service standards referenced in Section 66.008 if the provider is subject to those standards and has continued and unresolved customer service complaints indicating a clear failure on the part of the holder of a state-issued certificate of franchise authority to comply with the standards.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.014. DISCRIMINATION PROHIBITED. (a) The purpose of this section is to prevent discrimination among potential residential subscribers.

(b) A cable service provider or video service provider that has been granted a state-issued certificate of franchise authority may not deny access to service

to any group of potential residential subscribers because of the income of the residents in the local area in which such group resides.

(c) An affected person may seek enforcement of the requirements described by Subsection (b) by initiating a proceeding with the commission. A municipality within which the potential residential cable service or video service subscribers referenced in Subsection (b) may be considered an affected person for purposes of this section.

(d) The holder of a state-issued certificate of franchise authority shall have a reasonable period of time to become capable of providing cable service or video service to all households within the designated franchise area as defined in Section 66.003(b)(4) and may satisfy the requirements of this section through the use of an alternative technology that provides comparable content, service, and functionality.

(e) Notwithstanding any provision of this chapter, the commission has the authority to make the determination regarding the comparability of the technology and the service provided. Notwithstanding any provision of this chapter, the commission has the authority to monitor the deployment of cable services, video services, or alternate technology.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.015. COMPLIANCE. (a) Should the holder of a state-issued certificate of franchise authority be found by a court of competent jurisdiction to be in noncompliance with the requirements of this chapter, the court shall order the holder a state-issued certificate of franchise authority, within a specified reasonable period of time, to cure such noncompliance.

Failure to comply shall subject the holder of the state-issued franchise of franchise authority to penalties as the court shall reasonably impose, up to and including revocation of the state-issued certificate of franchise authority granted under this chapter.

(b) A municipality within which the provider offers cable service or video service shall be an appropriate party in any such litigation.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.016. APPLICABILITY OF OTHER LAWS. (a) Nothing in this chapter shall be interpreted to prevent a voice provider, cable service provider or video service provider, or municipality from seeking clarification of its rights and obligations under federal law or to exercise any right or authority under federal or state law.

(b) Nothing in this chapter shall limit the ability of a municipality under existing law to receive compensation for use of the public rights-of-way from entities determined not to be subject to all or part of this chapter, including but not limited to provider of Internet protocol cable or video services, unless such payments are expressly prohibited by federal law.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.